

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SHAWNA G. BARTELL,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

NO. C09-1154-RAJ-JPD

REPORT AND
RECOMMENDATION

Plaintiff Shawna G. Bartell appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED FOR FURTHER PROCEEDINGS.

I. FACTS AND PROCEDURAL HISTORY

At the time of her administrative hearing, plaintiff was a thirty-seven year-old woman with a high school equivalency (GED) education. Administrative Record (“AR”) at 36. Her

1 past work experience includes employment as a cleaner in a hospital setting and as a sales
2 attendant. *Id.* Plaintiff was last gainfully employed in 2005. AR at 26.

3 Plaintiff asserts that she is disabled due to degenerative disc disease of the lumbar
4 spine, dysthymic disorder, borderline intellectual functioning, post traumatic stress disorder
5 (“PTSD”), and panic order with agoraphobia. AR at 27. She asserts an onset date of June 20,
6 2005. AR at 26.

7 The Commissioner denied plaintiff’s claim initially and on reconsideration. AR at 24.
8 Plaintiff requested a hearing, which took place on November 4, 2008. AR at 442-76. On
9 December 1, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits
10 based on his finding that plaintiff could perform a specific job existing in significant numbers
11 in the national economy. AR at 24-38.

12 Plaintiff’s administrative appeal of the ALJ’s decision was denied by the Appeals
13 Council, AR at 5-8, making the ALJ’s ruling the “final decision” of the Commissioner as that
14 term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the
15 Commissioner’s decision. Dkt. No. 4.

16 II. JURISDICTION

17 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
18 405(g) and 1383(c)(3).

19 III. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
21 social security benefits when the ALJ’s findings are based on legal error or not supported by
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
23 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
24 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
25 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
26 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
 2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
 3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
 4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
 5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
 6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed
 8 and further administrative proceedings would serve no useful purpose." *McCartey v.*
 9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 12 claimant's evidence; (2) there are no outstanding issues that must be resolved
 13 before a determination of disability can be made; and (3) it is clear from the
 14 record that the ALJ would be required to find the claimant disabled if he
 15 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 17 erroneously rejected evidence may be credited when all three elements are met).

18 IV. EVALUATING DISABILITY

19 As the claimant, Ms. Bartell bears the burden of proving that she is disabled within the
 20 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
 21 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
 22 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
 23 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
 24 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
 25 are of such severity that she is unable to do her previous work, and cannot, considering her age,
 26 education, and work experience, engage in any other substantial gainful activity existing in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
9 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
10 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
11 or more medically severe impairments, or combination of impairments, that limit her physical
12 or mental ability to do basic work activities. If the claimant does not have such impairments,
13 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
14 impairment, the Commissioner moves to step three to determine whether the impairment meets
15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
22 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
23 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
24

25 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can
 2 perform other work that exists in significant numbers in the national economy, taking into
 3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
 4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
 5 claimant is unable to perform other work, then the claimant is found disabled and benefits may
 6 be awarded.

7 V. DECISION BELOW

8 On December 1, 2008, the ALJ issued a decision finding the following:

- 9 1. The claimant meets the insured status requirements of the Social
 10 Security Act through December 31, 2010.
- 11 2. The claimant has not engaged in substantial gainful activity since June
 12 30, 2005, the alleged onset date.
- 13 3. The claimant has the following severe impairments: degenerative disc
 14 disease of the lumbar spine, dysthymic disorder, borderline intellectual
 15 functioning (BIF), post traumatic stress disorder (PTSD) and panic
 16 disorder with agoraphobia.
- 17 4. The claimant does not have an impairment or combination of
 18 impairments that meets or medically equals one of the listed
 19 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 20 5. After careful consideration of the entire record, the undersigned finds
 21 that the claimant has the residual functional capacity to perform
 22 medium work as defined in 20 CFR 404.1567(c) and 416.967(c). The
 23 claimant can lift occasionally 50 pounds maximum and 25 pounds
 24 frequently; stand and walk up to six hours out of 8 hour work day; sit
 25 up to six hours out of eight work day. She can do pushing or pulling
 26 and operation of hand and/or foot controls within the limits of lifting
 and carrying. There are no manipulative or environmental limitations.
 She can climb stairs, but she should never climb ladders, ropes or
 scaffolds. She has no limitations on stooping or bending and can
 occasional crawl. Additionally, the claimant retains the mental
 capacity to adequately perform the mental activities generally required
 by competitive remunerative, unskilled work as follows: understand,
 remember and carry out simple instructions compatible with unskilled
 work; would have average ability to perform sustained work activities
 (i.e. can maintain attention and concentration; persistence and pace) in

an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule) with customary tolerances of employers rules regarding sick leave and absence. She can make judgment commensurate with the functions of unskilled work i.e., simple work-related decisions; respond appropriately to supervision, co-workers and work situations; and deal with changes all within a routine work setting not dealing with the general public as in a retail sales position. However, incidental contact with the general public is not precluded as would occur in cleaning positions such as in a hotel or motel.

6. The claimant is unable to perform any past relevant work.
7. The claimant was born on [REDACTED], 1971² and was 34 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date.
8. The claimant has at least a high school education and is able to communicate in English.
9. Transferability of job skills is not an issue in this case because the claimant's past relevant work is unskilled.
10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.
11. The claimant has not been under a disability, as defined in the Social Security Act, from June 30, 2005 through the date of this decision.
12. The claimant's substance abuse disorder is not a factor material to the finding of disability.

AR at 26-37.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Did the ALJ Err by Finding that Plaintiff's Severe Impairments Did Not Constitute a Listing?
2. Did the ALJ Err in this Treatment of the Medical Evidence?

² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 Among other things, plaintiff asserted that she had a hard time leaving the house (AR at
2 452), that she spent most of the day in her room, sleeping, crying, or watching television, (AR at
3 453), and that she thought “all the time” about her father’s death, as he had been shot by the police,
4 although she did not witness the shooting (AR at 455-56). She also testified that she had anxiety
5 attacks two or three times a week (AR at 456), but that medication helped her symptoms (AR at
6 457). She did not believe she could return to work as a sales attendant because she had a hard time
7 being around people and because she was in pain. She estimated she could stand for only 10 to 15
8 minutes (AR at 461-62) and that she was uncomfortable with even very brief interaction with
9 others. AR at 462-63.

10 The ALJ found that plaintiff’s impairments were not as limiting as she claimed. He
11 noted that plaintiff admitted she could care for all of her personal needs and hygiene, prepare
12 meals, perform household chores, and care for her granddaughter. AR at 34, 94-95. She also
13 reported that she left the house once or twice a day and had no problems shopping for food or
14 household items twice a week for an hour, activities he concluded which were inconsistent
15 with her self-report. AR at 96.

16 In addition to these activities, the ALJ determined that plaintiff’s ability to work for
17 several months after her alleged onset date was inconsistent with her claims of symptoms. AR
18 at 34. Plaintiff worked for several months after her alleged onset date as a housekeeper. AR at
19 448-49. She testified that she was able to perform this job despite any alleged physical
20 difficulties. AR at 449. It was not unreasonable for the ALJ to conclude that this detracted
21 from her claim that she could not stand for more than 10 to 15 minutes (Tr. 462). *Id.* A tendency
22 to exaggerate is a legitimate consideration in determining credibility. *Tonapetyan v. Halter*, 242
23 F.3d 1144, 1148 (9th Cir. 2001).

24 The ALJ also found that plaintiff’s claim that she became unable to work in June 2005 was
25 undermined by her lack of employment history prior to her alleged onset date of disability. AR at
26 35. Plaintiff’s earning records show that from 1991 to 2006, she earned over \$10,000 only during

1 2 years. The fact that plaintiff has “an ‘extremely poor work history’ and ‘has shown little
2 propensity to work in her lifetime,’” was a specific, clear, and convincing reason to discredit her
3 claimed inability to work. *Thomas*, 278 F.3d at 959. Further, the ALJ properly inferred that
4 plaintiff’s claims of disability, in light of her poor work history and receipt of free rent from her
5 grandparents raised an issue of motivation and secondary gain. Evidence of self limitation and lack
6 of motivation by a claimant are appropriate considerations in determining the credibility of a
7 claimant’s excess symptom testimony. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir.
8 2001).

9 Finally, the ALJ also concluded plaintiff’s claims of symptoms were not credible as
10 they were not supported by findings in the medical evidence (Tr. 34). For example, plaintiff’s
11 claim that she could only stand for 10 to 15 minutes is contradicted by Dr. Kim’s assessment
12 that Plaintiff could perform light work. AR at 225, 462. In judging credibility, the ALJ may
13 consider “testimony from physicians and third parties concerning the nature, severity, and
14 effect of the symptoms of which [claimant] complains.” *Id.* at 958-59, *quoting Light v. Soc.*
15 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ’s adverse credibility determination is
16 supported by substantial evidence as that term is defined above. The ALJ did not err.

17 B. The ALJ Erred, In Part, In His Assessment of the Medical Evidence

18 At step 3 of the sequential evaluation process, the Commissioner must determine
19 whether the claimant’s “severe” impairments, individually or in combination, meet or equal an
20 Appendix 1 Medical Listing and are “presumptively” disabling. 20 CFR §404.1520(d). If a
21 claimant’s severe impairments meet or equal a listing, the claimant is found disabled, and the
22 inquiry ends. *Id.* The Listings for mental impairments are found at 20 CFR 404 Subpart P,
23 Appendix 1, 12.00 et. seq.

24 At step 2 of the sequential evaluation process, the ALJ found that plaintiff has severe
25 mental impairments of dysthymic disorder, borderline intellectual functioning (“BIF”), PTSD,
26 and a panic disorder with agoraphobia. AR at 27, Finding No. 3. These impairments correlate

1 to Listings 12.04 for affective disorders, 12.05 for mental retardation, and 12.06 for anxiety
2 disorders. 20 CFR 404 Subpart P, Appendix 1, 12.04, 12.05, and 12.06. At step 3, the ALJ
3 found that none of plaintiff's mental impairments meet or equal any listed impairment. AR at
4 30. Plaintiff assigns error to this finding. In addition, plaintiff claims the ALJ erred by
5 ignoring Dr. Harmon's conclusion that plaintiff "appeared" to meet the criteria for a 12.04 and
6 12.02 Listing.

7 Although the ALJ stated that "No treating or examining physician has mentioned
8 findings equivalent in severity to the criteria of any listed impairment," (AR at 30), that
9 conclusion is incorrect. The Commissioner concedes that Drs. Parlatore, Lind, Ms. Gibson and
10 Ms. LaHatt provided opinions that would be equivalent to the severity criteria of the
11 Commissioner's listings for an affective disorder (12.04) and an anxiety disorder (12.06) Dkt.
12 No. 15 at 13. However, the Commissioner argues that the ALJ properly rejected these
13 opinions. As to the separate claim of a Listing pursuant to 12.05(c), the Commissioner claims
14 the plaintiff is relying upon an incorrect IQ score. *Id.* at 14.

15 *1. 12.04 and 12.06 Listings*

16 Whether the ALJ erred by failing to find a 12.04 or 12.06 Listing depends upon
17 whether the ALJ properly evaluated the medical evidence offered by Drs. Parlatore, Lind, Ms.
18 Gibson and Ms. LaHatt. If the ALJ evaluated the opinions properly, then the statement
19 included in his opinion that no examining physician found that plaintiff's metal impairments
20 met or equaled a Listing is immaterial. If the ALJ did not properly evaluate the medical
21 opinions, this case must be reversed.

22 *2. Standards for Review of Medical Evidence*

23 As a matter of law, more weight is given to a treating physician's opinion than to that
24 of a non-treating physician because a treating physician "is employed to cure and has a greater
25 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d
26 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating

1 physician's opinion, however, is not necessarily conclusive as to either a physical condition or
2 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
3 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
4 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
5 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
6 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough
7 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
8 making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
9 merely state his conclusions. "He must set forth his own interpretations and explain why they,
10 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
11 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,
12 157 F.3d at 725.

13 The opinions of examining physicians are to be given more weight than non-examining
14 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
15 uncontradicted opinions of examining physicians may not be rejected without clear and
16 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
17 physician only by providing specific and legitimate reasons that are supported by the record.
18 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

19 Opinions from non-examining medical sources are to be given less weight than treating
20 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
21 opinions from such sources and may not simply ignore them. In other words, an ALJ must
22 evaluate the opinion of a non-examining source and explain the weight given to it. Social
23 Security Ruling ("SSR") 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
24 more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a
25 non-examining doctor's opinion may nonetheless constitute substantial evidence if it is
26

1 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
2 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

3 a. Anselm Parlatore, M.D.

4 In July 2005, Dr. Parlatore evaluated plaintiff. AR at 172-75. He diagnosed plaintiff
5 with PTSD, panic disorder and dysythmia. AR at 173. He found that she had only mild
6 cognitive limitations, but also found she would have marked limitations in her ability to relate
7 to co-workers and supervisors and the public, and had severe limitations regarding responding
8 appropriately to pressures in the workplace. AR at 174. In July 2008, Dr. Parlatore completed
9 a questionnaire, stating plaintiff had affective disorder and anxiety disorder that each resulted
10 in marked restrictions in activities of daily living, marked difficulties in social functioning,
11 frequent deficiencies of concentration, persistence or pace, and frequent episodes of
12 decompensation, each of extended duration. AR at 210-15.

13 b. Michelle Gibson, ARNP

14 Nurse Gibson evaluated plaintiff in March 2008. Plaintiff was initially referred in
15 February 2007, but plaintiff missed her evaluation at that time, and also missed 8 out of 11
16 scheduled case management appointments. AR at 341. In her 2008 evaluation, Nurse Gibson
17 diagnosed plaintiff with major depressive episode, recurrent without psychotic features, PTSD,
18 and amphetamine abuse, in remission. She assigned a Global assessment function rating
19 (“GAF”) of 50.³ Nurse Gibson also provided answers to written interrogatories in October
20

21 ³ The GAF score is a subjective determination based on a scale of 1 to 100 of “the
22 clinician’s judgment of the individual’s overall level of functioning.” AMERICAN PSYCHIATRIC
23 ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).
24 A GAF score falls within a particular 10-point range if either the symptom severity or the level
25 of functioning falls within the range. *Id.* at 32. For example, a GAF score of 51-60 indicates
26 “moderate symptoms,” such as a flat affect or occasional panic attacks, or “moderate difficulty
in social or occupational functioning.” *Id.* at 34. A GAF score of 41-50 indicates “[s]erious
symptoms,” such as suicidal ideation or severe obsessional rituals, or “any serious impairment
in social, occupational, or school functioning,” such as the lack of friends and/or the inability
to keep a job. *Id.* A GAF score of 31-40 indicates “some impairment in reality testing and

2008, opining that plaintiff's depression resulted in frequent deficiencies in concentration, persistence or pace and that her PTSD results in extreme difficulties in maintaining social functioning. AR at 401-02.

c. Karen LaHatt, LMHC

Ms. LaHatt is a licensed mental health counselor who evaluated plaintiff. In written interrogatories, she opined that plaintiff's depression resulted in marked limitations of social functioning; and constant deficiencies of concentration, persistence or pace; and that her PTSD results in marked limitations in social functioning and marked deficiencies of concentration. AR at 249, 252.

d. The ALJ Erred Regarding Dr. Parlato, Nurse Gibson and Ms. LaHatt

The ALJ did not state what weight he gave to the opinions of Dr. Parlato, Nurse Gibson and Ms. LaHatt, but he evidently rejected them.

As for the opinion evidence, Dr. Parlato, the claimant's therapist, and the claimant's nurse practitioner have all completed evaluations of the claimant, but they have not provided supportive objective evidence from their evaluations to support the limitations that they have assessed (Exhibits 3F; 8F; 11F; 21F). The claimant's activities suggest that she has the ability to get along with others, to maintain attention and concentration and deal with some stress [better] than these providers have indicated. The claimant has demonstrated a good ability to maintain appropriate behavior in every evaluation in the record.

AR at 35.

Plaintiff claims that the ALJ's statement that the providers failed to provide supportive objective evidence is not supported by the record. She is correct. Dr. Parlato completed Section D of the Department of Social and Health Services ("DSHS") form setting forth his clinical findings. AR at 172-75. Nurse Gibson provided her psychiatric evaluations. AR at 342. Ms. LaHatt stated that her assessments were based in part on plaintiff's hyper-startle

communication" or "major impairment in several areas, such as work or school, family relations, judgment, thinking or mood" *Id.*

1 response and hyper-vigilance. AR at 253. Although the ALJ also cited reasons that could
 2 support his ultimate conclusions relating to credibility, reliance on self-reporting, and daily
 3 activities, a major justification given by the ALJ does not withstand scrutiny. For this reason,
 4 this case must be remanded for further proceedings to reevaluate the medical opinions of Dr.
 5 Parlatore, Nurse Gibson and Ms. LaHatt.

6 3. *12.05(c) Listing*

7 To meet the requirements of 12.05(c), a claimant must have a valid verbal,
 8 performance, or full scale IQ of 60 through 70, and a physical or other mental impairment
 9 imposing an additional and significant work-related limitation of function. 20 CFR 404
 10 Subpart P, Appendix 1, Listing 12.05. Here, the ALJ found that the “‘paragraph C’ criteria of
 11 listing 12.05 are not met because the claimant does not have a valid verbal, performance, or
 12 full scale IQ of 60 through 70 and a physical or other mental impairment imposing an
 13 additional and significant work-related limitation of function.” AR at 32. Plaintiff claims the
 14 ALJ erred asserting plaintiff had a severe mental impairment of borderline intellectual
 15 functioning based on Dr. Lind’s report, which included a “Full Scale IQ of 67 (borderline),”
 16 (AR at 27), in addition to severe physical impairments. However, the ALJ misreported Dr.
 17 Lind’s results. A review of Dr. Lind’s report confirms the Commissioner’s argument that the
 18 ALJ misread Dr. Lind’s report, and that Dr. Lind reported a Full Scale IQ of 74 for plaintiff.
 19 AR at 170. In her reply, plaintiff does not contend otherwise. The ALJ did not err in
 20 concluding that plaintiff did not meet a 12.05(c) Listing.

21 4. *12.02 Listing*

22 On September 18, 2008, Dr. Dana Harmon completed a Certification for Medicaid,
 23 stating:

24 Shawna appears to meet the SSA criteria for 12.04, Affective Disorders, and
 25 12.02, Organic Mental Disorders. Dr. Lind’s psychological evaluation
 26 diagnosed her with a Major Depressive Disorder and borderline intellectual
 functioning, with a “marked” level of severity. Shawna’s problems with school

1 and learning and need for special education services would also be significant
2 obstacles to her employment or vocational rehabilitation.

3 AR at 388.

4 It appears that Dr. Harmon's opinions are based on his review of Dr. Lind's
5 psychological evaluation. To a certain extent, therefore, it would seem that Dr. Harmon's
6 conclusions are dependent upon Dr. Lind's conclusions. Although this may seem self-evident,
7 the ALJ did not make reference to the opinion of Dr. Harmon. Dr. Harmon's opinion is
8 significant probative evidence, and the failure to discuss this evidence requires a remand.
9 *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984).

10 C. The ALJ Did Not Err In His Assessment of the Medical Opinions of Ellen
11 Walker Lind, Ph.D

12 In January and February 2006, Dr. Lind performed a psychological evaluation of
13 plaintiff. AR 166-171. She diagnosed plaintiff with PTSD, panic disorder without
14 agoraphobia, dysthymic disorder, and BIF. She assessed plaintiff's GAF at 38. The ALJ
15 accorded no weight to Dr. Lind's opinion.

16 The undersigned gives no weight to Dr. Lind's opinion as she apparently relied
17 quite heavily on the subjective report of symptoms and limitations provided by
18 the claimant, and seemed to uncritically accept as true most, if not all, of what
19 the claimant reported. Yet, as explained elsewhere in this decision there exist
20 reasons for questioning the reliability of the claimant's subjective complaints.
21 Furthermore, there is no supportive objective documentation for these opinions
22 that the claimant has very limited functional ability.

23 AR at 35.

24 Although Dr. Lind performed some intelligence testing (AR at 170-71), the ALJ did not
25 err by rejecting her opinions. Plaintiff argues that the finding that Dr. Lind relied upon the
26 subjective reports of symptoms and limitations by plaintiff for support is speculation. That
assessment is not accurate. Dr. Lind's report is replete with references to self-reports. AR
166-169. During her evaluation, she was reported to be cooperative, and oriented to person,
place, time and situation. She demonstrated no evidence of psychomotor agitation or

1 retardation. Her speech was normal. She was able to name current and past presidents and
 2 recalled two of three objects after a five-minute delay. She recalled seven digits forward and
 3 four backwards. She was able to complete a serial counting task to 40 with one error, and
 4 correctly spelled the word “world” forward and backward. Her abstract reasoning skills were
 5 estimated to be below average.

6 Nevertheless, she self-reported to Dr. Lind that she suffered from depression for a long
 7 time, that she had panic attacks that caused her to cry and to be unable to breathe, that she had
 8 “ongoing” problems with PTSD, and that her current family situation was quite stressful. AR
 9 at 166-170. In September 2008, plaintiff reported fatigue, low energy, and that “focus is
 10 difficult.” AR at 384. Notwithstanding the self-reports of focus difficulties, she drove herself
 11 to her appointment, she arrived on time, there was no evidence of psychomotor agitation or
 12 retardation, and her speech was reported normal. She was also able to remember 3 out of 3
 13 objects after 5 minutes, and could remember 6 digits forward and 4 digits backwards. AR at
 14 386.

15 The ALJ may reject a doctor’s opinion when it is “conclusory, brief, and unsupported
 16 by the record as a whole. . . or by objective medical findings.” *Batson v. Comm’r of Soc. Sec.*
 17 *Admin.*, 359 F. 3d 1190, 1195 (9th Cir. 2004). Moreover, in light of the adverse credibility
 18 determination made by the ALJ, it was not inappropriate for the ALJ to reject reports based on
 19 a claimant’s self-reporting. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir 2008). The
 20 ALJ did not err by assigning no weight to the opinion of Dr. Lind.

21 D. The ALJ Erred in His Assessment of the Opinion of Chi-Na Kim, M.D., but the
 22 Error is Harmless

23 Plaintiff was evaluated by Dr. Kim in 2005, as part of a DSHS medical review. AR at
 24 332-27. Dr. Kim concluded that plaintiff was able to work, but restricted the work to the light
 25 exertional level. The ALJ rejected Dr. Kim’s assessment.

26 Dr. Kim’s opinions are not granted probative weight as he saw the claimant
 only once for a short evaluation for general assistance. Further, there lacks a

1 narrative discussion and supportive documentation for the opinion of limiting
2 the claimant to light work.

3 AR at 35. The ALJ erred when he concluded that there no objective evidence. Dr. Kim noted
4 in the report that there was limited range of motion in plaintiff's back, especially her lower
5 back, and noted "Leg raise [positive] Left 60 degrees." AR at 224. However, Dr. Kim also
6 reported the severity rating was only "mild." AR at 225. The mild severity rating was not
7 noted by the ALJ as the reason for rejecting Dr. Kim's opinion, and the reasons offered are
8 somewhat contradicted by the record. Accordingly, the ALJ erred in his treatment of Dr.
9 Kim's opinion.

10 This error, however, is harmless. Because he did not give probative weight to Dr.
11 Kim's opinion, the ALJ concluded that plaintiff had an RFC that permitted her to engage in
12 work with a medium exertional capacity. AR at 32. Nevertheless, at Step 5 of the sequential
13 disability evaluation process, based on the Vocational Expert ("VE") opinion, the ALJ
14 concluded that there were jobs in the national economy that plaintiff could perform, but each of
15 the jobs identified required only a "Light" exertional capacity, consistent with Dr. Kim's
16 opinion.

17 There was no requirement that the ALJ adopt Dr. Kim's limitation to a job involving
18 only a "Light" exertional capacity. However, the ALJ's proffered reasons for rejecting Dr.
19 Kim's opinions do not withstand scrutiny. Nevertheless, because the jobs found at Step 5 were
20 consistent with Dr. Kim's conclusions, any error that the ALJ committed must be considered
21 harmless.

22 VIII. CONCLUSION


23 For the foregoing reasons, the Court recommends that this case be REVERSED and
24 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
25 instructions. Specifically, the undersigned recommends that the Commissioner's adverse
26 credibility determination, the finding that plaintiff did not meet a Listing, pursuant to 12.05(c),

1 and the assessment of Dr. Lind's opinion be affirmed. In addition, the undersigned further
2 recommends that the error in treatment of Dr. Kim's opinion be treated as harmless error.

3 The undersigned also recommends that on remand, the Commissioner be directed to
4 reconsider the medial opinions of Dr. Parlatore, Nurse Gibson and Ms LaHatt, in light of the
5 objective evidence that supports the opinions generally, and specifically whether the plaintiff's
6 impairments are equivalent to a 12.04 and 12.06 Listing. Finally, the undersigned recommends
7 that the Commissioner be directed to review the medical opinion of Dr. Harmon, and assess
8 whether plaintiff's impairments are the equivalent to a Listing pursuant to 12.02 and 12.04.

9 A proposed order accompanies this Report and Recommendation.

10 DATED this 30th day of April, 2010.

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12 JAMES P. DONOHUE
13 United States Magistrate Judge
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